



## Confederated Tribes of the Colville Reservation

### Office of Environmental Trust

P. O. Box 150, Nespelem, WA 99155

Phone: 509-634-4711, Fax: 509-634-2427

September 17, 2003

Congressman George R. Nethercutt, Jr.  
United States Congress  
2443 Rayburn House Office Building  
Washington, D.C. 20515

Re: Response of the Environmental Trust Department to Mr. Kavinsky's Request  
for Information Concerning the EPA Decision-Making Process at the Upper  
Columbia River/Lake Roosevelt Superfund Site

Dear Congressman Nethercutt:

When we last met with you and Mr. Kavinsky, your Director of Legislative Affairs, on July 15, 2003, in Washington, D.C., we left the meeting with a clear understanding that you felt that the parties responsible for polluting United States waters shall pay their share of clean-up costs. We also understood that you and Mr. Kavinsky felt that, if possible, an alternative to the resource consumption Superfund NPL listing process would be your preferred alternative. We left a letter with you on July 15, 2003 when we met, a copy of which is attached as Exhibit A.

In the course of our discussion with Mr. Kavinsky, we discussed EPA's June 24, 2002 Guidance Document that addresses an "Enforcement Approach for Superfund Alternative Site." (OSWER 92-08.0-17, a copy of which is attached as Exhibit B). The Environmental Trust Department (ETD) of the Confederated Tribes of the Colville Indian Reservation has consistently taken the position in support of EPA's adoption of either the NPL listing process, or the alternative approach as set out in the Guidance Document. What the Tribes and ETD object to is EPA's adoption of a third, non-enforcement alternative, that would neither be consistent with Superfund nor protective of the Tribes' or the State's interest at the site.

Consistent with your belief that the foreign corporation "PRP should pay" (and not the U.S. taxpayers), both the State Department of Ecology and the ETD have repeatedly advised EPA that we support the EPA alternative approaches at the site. At the close of our July 15

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meeting, Mr. Kavinsky asked that we advise your office of those elements of the EPA alternative approach that the ETD wanted to see implemented at the site. Accordingly, set out below is our response.

To comply with applicable law and policy, and the trust obligation EPA owes to the Tribes, it is the position of the ETD that EPA's implementation of the agency's Response Selection and Enforcement Approach for Superfund Alternative Sites, as presented in OSWER 92-08.0-17 (June 24, 2002), must at a minimum include the following elements:

**1. General Requirements**

- Settlements covering these Superfund alternative site response actions should be equivalent to those required at NPL sites
- If listing on NPL is suspended, EPA's enforcement posture *should* be equivalent to its enforcement posture at NPL sites
- EPA must provide Tribal governments the same opportunity for involvement as that provided at NPL sites

**2. EPA/Tribal/State Relationship for Superfund Alternative Sites**

- EPA Regional Office will notify the State and Tribe of EPA's decision to address a site as a Superfund Alternative site
- *Prior to* initiating negotiations with the PRPs for cleanup, Regional EPA should consult with the State and Tribe regarding: (1) addressing the site as a Superfund Alternative; (2) remedy selection; (3) site management; and (4) proposed enforcement actions.

**3. Response Selection Approach for Superfund Alternative Sites**

- Suspending the listing of a site on the NPL *should not* impact response selection process - if the listing is suspended, EPA *will*:
  - Prepare RI/FS and ROD documenting the final cleanup decision (NCP §300.430 (d), (e), and (f)).

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- Select and attain ARARs - Superfund Alternative sites should attain the same cleanup levels as NPL sites (CERCLA § 121 and NCP §300.430)
- Involve communities in decisions *in the same manner* as at NPL sites (NCP §300.430)
- Coordinate with Natural Resource Trustees in accordance with CERCLA §§ 104(b)(2) and 122(j)
- A Superfund Alternative consent decree should require the PRPs to implement the remedy with the appropriate level of EPA oversight
- Ensure a complete cleanup in accordance with NCP standards
- Certify that the work is complete and the performance standards have been attained at Superfund Alternative sites using the *same* process used for NPL sites

#### **4. Enforcement Approach for Superfund Alternative Settlements**

- Settlements at Superfund Alternative sites should achieve the *same* results as those achieved at NPL sites
- EPA *may* allow PRPs to perform investigation, removal or remedial action *consistent with* the NCP at sites which are not on the NPL *upon a determination that* such action will be done properly and promptly
- Settlements at a Superfund Alternative site should place EPA in an enforcement posture *equivalent to* that which EPA would have if the site were listed on the NPL (because sites not listed on the NPL are not eligible for Superfund-financed remedial actions)
- Regional EPA should use existing AOC models in drafting settlement documents when negotiating for removal and RI/FS actions at Superfund Alternative sites
- Regional EPA should proceed with listing should the negotiations extend beyond the negotiation moratorium

**5. Technical Assistance for the Local Community**

- If EPA has not awarded a TAG grant by the time of the Superfund Alternative enforcement agreement, PRPs should provide funds for technical assistance to communities in substitution for EPA *to be consistent with* an NPL cleanup
- Even though PRPs agree to this funding, EPA should continue to provide information early in the process to the community and maintain its traditional role of involving the community throughout the response action

**6. Natural Resources Damages Stipulation**

- Regional EPA has the responsibility *in all cases* to notify potentially affected trustees (federal, state, and tribal) of the Superfund Alternative designation and commencement of investigations and negotiations at Superfund Alternative sites
- Regional EPA should ensure settlements contain a stipulation from the PRPs that they will *not* assert a challenge to the United States' NRD claims based on a statute of limitations defense - this stipulation should be included *regardless* of whether the NRD claims are known at the time of the agreement

**7. Agreement Not to Challenge Listing After a Partial Cleanup**

- EPA should obtain a *waiver* from PRPs of their ability to challenge the listing based on changed site conditions due to partial cleanup
- EPA should be prepared to quickly finalize a *listing package* should it be necessary to list the site (i.e., *Regional EPA should ensure that a draft listing package is prepared prior to entering a Superfund Alternative agreement for removal or remedial action, and maintain a current Administrative Record*)
- In the event the PRP performs only a portion of the anticipated response, EPA should proceed to list the site based on site conditions documented in the draft listing package prepared *prior to* initiation of PRP-lead removal or remedial action work, using the *initial* HRS score - work done by the PRP up until that point is *not* to be taken into consideration

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**8. Financial Assurance Mechanisms for Work Continuance**

PRPs should provide financial assurance instrument(s) in the event that EPA must complete part or all of the remedial work (Regional EPA should require PRPs to use a fully secured mechanism)

We trust that you will find this letter to be responsive to your request. Please call me if you have any questions.

Sincerely,

Joseph A. Pakootas, Chairperson  
Colville Business Council